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No. 3 —

In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., PETITIONERS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., AND ERIC G. KAUFMAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the Attorney General and the Treasurer of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on April 14, 1960.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (J.A.[1] 147–152; App. B, *infra*, pp. 27–32) is unreported. The opinion of the Court of Appeals (App. A, *infra*, pp. 14–24) is reported at 278 F. 2d 268.

[1] "J.A." refers to the joint appendix filed in the court below.

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, p. 25) was entered on April 14, 1960. A timely petition for rehearing *en banc* was denied on May 11, 1960 (App. A, *infra*, p. 26). The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Black, on August 4, 1960, to and including September 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the refusal of the courts below to modify a prior order of reference so as to provide that this case shall ultimately be tried before a District Judge, rather than before a master, constituted an abuse of discretion and a departure from principles established by this Court in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249.

RULE INVOLVED

Rule 53 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

* * * * *

> (b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.
>
> * * * * *
>
> (e) *Report.*
>
> * * * * *

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. * * *

* * * * * *

STATEMENT

Respondent, a Swiss corporation (I.G. Chemie), instituted suit in October 1948 under Section 9(a) of the Trading with the Enemy Act, as amended (40 Stat. 419, as amended, 50 U.S.C. App. 9(a)), to recover property seized by the Alien Property Custodian consisting of approximately 93% of the stock in General Aniline & Film Corporation, New York, valued at more than $100,000,000, and cash of approximately $2,000,000 (J.A. 17–33). Petitioners' answer challenges respondent's claim of ownership and alleges that respondent is an enemy and enemy-tainted, without standing to maintain the action (J.A. 34–55). See *Societe Internationale* v. *Rogers*, 357 U.S. 197. The respondent-intervenors represent some 1,700 stockholders of respondent who have intervened, pursuant to this Court's decision in *Kaufman* v. *Societe Internationale*, 343 U.S. 156, to assert rights in the seized assets proportionate to their stockholdings in I.G. Chemie.

On January 18, 1949, petitioners moved for the designation of a Special Judge to hear and superintend all matters in this case preliminary to trial (J.A. 56–57). That motion was denied without prejudice on July 5, 1949 (J.A. 64). In the course of argument on motions relating to depositions and discovery in April 1949 and January 1950, the late Chief Judge

Bolitha J. Laws, *sua sponte*, suggested the appointment of a Special Master, expressing doubt as to whether he could, as a matter of law, designate a Special Judge (J.A. 58–64, 67–74). On February 14, 1950, Chief Judge Laws appointed a Special Master to whom was referred "the determination and findings of all issues of facts and law involved in said action" (J.A. 74–76). Petitioners consented to the appointment of the Master (J.A. 162). Respondent opposed it (J.A. 76–78). On January 4, 1951, less than a year after the appointment of the Special Master, Chief Judge Laws designated Judge (now Chief Judge) David A. Pine as Special Judge for this case.

After his appointment, the Special Master presided over a lengthy deposition, which was concluded in May 1950. On October 31, 1950, petitioners moved to dismiss the complaint by reason of respondent's failure to comply with an order of production entered on July 5, 1949 (J.A. 79). The motion to dismiss was granted by the District Court on December 21, 1953 (J.A. 100). The Court of Appeals affirmed the dismissal on June 30, 1955, but granted respondent an additional six months within which to comply with the order for production (225 F. 2d 532). This Court denied a petition for a writ of certiorari (350 U.S. 937). On August 3, 1956, after the expiration of the six months' period granted by the Court of Appeals, the District Court entered an order upon the mandate of the appellate court affirming its original dismissal. The Court of Appeals again affirmed (243 F. 2d 354). This Court thereupon granted re-

spondent's petition for a writ of certiorari (355 U.S. 812), and, on June 16, 1958, reversed the dismissal of the complaint and remanded the case to the District Court for further proceedings (357 U.S. 197).

Between the date of the appointment of the Master in February 1950 and the granting of the motion to dismiss by the District Court in 1953, the Master presided over one deposition and heard motions in four discovery matters. The Master also presided over a hearing to ascertain respondents' good faith in complying with the order for production, but this proceeding was conducted under a separate order of reference dated March 1, 1951 (J.A. 86), and not under the order of reference here in question. On May 12, 1953, on respondent's motion, proceedings before the Special Master were stayed by order of the District Court (J.A. 99a). The Master was thereafter occupied solely with matters concerning discovery and with questions pertaining to the intervenors rather than respondent (J.A. 4–16, 87, 102, 105, 112, 123, 125, 174–177 202–204, 214–216). At no time has the Master been called upon to hear or determine any issues of fact raised by the pleadings in this litigation.

On October 1, 1958, shortly after this Court's reversal of the order dismissing the complaint and its remand for further proceedings, the Government moved in the District Court for an order terminating the reference to the Special Master or, in the alternative, modifying it so as to confine the Special Master's authority to the conduct and supervision of discovery proceedings and depositions (J.A. 135). The por-

tion of the motion addressed to complete termination of the reference was subsequently abandoned (J.A. 136, 149). The District Court denied the motion by order dated March 9, 1959 (J.A. 155–156) for reasons stated in its oral opinion of February 6, 1959 (J.A. 147–152; App. B, pp. 27–32). Leave to take an interlocutory appeal pursuant to 28 U.S.C. 1292(b) was granted by the Court of Appeals on April 16, 1959. The Court of Appeals affirmed (Judge Fahy dissenting) on April 14, 1960.

REASONS FOR GRANTING THE WRIT

The upshot of the decision below is that this case, which [redacted] involves a great sum of money and is "of large importance, with international as well as domestic ramifications." (the quoted words are Judge Fahy's, App. A, p. 23), must be tried in its entirety before a master, rather than by a United States District Judge. The issues to be thus determined are not only difficult and treacherous—involving as they do the formation of judgments as to whether complex business and financial transactions were *bona fide* dealings or were the expression of a devious purpose to "cloak" the assets of I.G. Farben—but must be resolved in a context which makes the task facing the trier of the facts an especially demanding one. The evidence which might prove most telling in this case may never be seen; papers which are in the possession of respondent's house bank may remain shrouded as a result of the operation of Swiss bank secrecy and economic

[2] As to issues which have been placed before the International Court of Justice, see *Interhandel Case*, Judgment of March 21, 1959, I.C.J. Reports 1959, p. 6.

espionage laws. In the absence of full disclosure, as this Court recognized in its prior opinion (357 U.S. at 212–213), it will become necessary not only to evaluate the proof which *is* offered, but to draw inferences on the basis of what has *not* been tendered. If documents that might prove relevant remain unexamined by the Government's attorneys and by the court and if, at the same time, respondent is not to "profit through its inability to tender the records called for" (*id.* at 212), then truly this is peculiarly a case which should be tried by an experienced member of the federal judiciary.

We believe that the failure to provide for trial before a District Judge upon completion of the pre-trial proceedings (which are still in progress) is not only an improper disposition because of circumstances which compellingly argue that an experienced trial judge is peculiarly needed, but that this disposition is irreconcilable (as Judge Fahy concluded in his dissent, App. A, p. 21) with this Court's decision in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249.[3] It is

[3] The Court of Appeals affirmed the District Court, it should be noted, because it thought that reference of this case to a master was permissible under the standards laid down in *LaBuy*. It did not rest its judgment on the theory that the Government had waived its right to object. See App. A, p. 20.

The District Court, on the other hand, believed that, as an original matter, reference of this case to a master would be contrary to Rule 53(b), but was of the view that the Government had waived its rights. App. B, pp. 28–31. We shall point out (pp. 11–13, *infra*) that this is erroneous and that the District Court's basis of decision does not provide an adequate ground for sustaining the judgment below if it should be concluded that the Court of Appeals misconstrued the principles of *LaBuy*.

obvious, moreover, as all of the judges of the Court of Appeals were agreed, that the matter at issue is one which should be determined at this juncture since it will plainly control the entire future course of the litigation.

1. The core of the Court of Appeals' decision is that reference to a master was appropriate in this case because it is a big and intricate lawsuit. We submit that the premise is correct and the conclusion wrong. There are, to be sure, intricate and detailed matters which are appropri[illegible] for reference to a master—typically, matters which involve computation or accounting. Note the reference in Rule 53(b) to "matters of account." But the fact that the ultimate issue to be determined may require introduction of an unusually large quantum of evidence and may call for an assessment of many intercorporate transactions—features which are, of course, common to every large antitrust case—does not support the conclusion that the case is one to be tried in its entirety by a master.[4] That is the plain teaching of *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, an antitrust case in which it was sought to justify the reference on precisely the grounds which were accepted by the

[4] The conduct of the protracted case has been the subject of a seminar in August 1957 co-sponsored by a committee of the Judicial Conference and a committee of judges appointed by the Chief Justice of the United States (21 F.R.D. 395). The Prettyman Report, endorsed and adopted by the Conference and the seminar, expressed the opinion that "big" cases should not be referred in their entirety to masters (13 F.R.D. 62 at page 83; 21 F.R.D. 395 at page 521). See, also, Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Col. L. Rev. 452, 458–459 (1958).

court below. Holding that Judge LaBuy had exceeded his authority in ordering a reference, this Court stated (p. 259):

> But most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court. On the contrary, we believe that this is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work. Nor does petitioner's claim of the great length of time these trials will require offer exceptional grounds.[5]

The opinion below also suggests (App. A, pp. 17–18) that this case is distinguishable from *LaBuy* because Chief Judge Laws proceeded deliberately and cautiously before deciding to refer the case. We agree that Judge Laws did not reach his decision lightly. We agree, moreover, that there were persuasive considerations supporting reference of a portion of the case—the detailed and lengthy pre-trial proceedings involving, *inter alia*, the exchange of many thousands of documents—to a special master. But this does not

[5] The stockholders of the plaintiff did not intervene in the instant case until 1952, some two years after the entry of the order of reference, and, therefore, could not have been a factor considered by Judge Laws. In any event, the *LaBuy* case had some 93 plaintiffs and a dozen defendants at the time the petition for mandamus was filed. Nor is it apparent why the number of parties to a lawsuit should of itself create an exceptional condition with respect to the trial of the issues of fact. Moreover, the claims of the intervenors are secondary to the main litigation for, should respondent prevail, the intervenors have no claims at all.

answer the question whether it is now appropriate to insist that the trial itself—which is still many months in the future[6]—be conducted by the master. It is notable that the exceptional conditions cited in Judge Laws' order of reference relate solely to the complexities which had arisen in connection with the pre-trial proceedings, *i.e.*, the production of documents and the taking of depositions from foreign witnesses. See J.A. 74–75. Yet it appears clear that a *trial* may be conducted by a master only when the exceptional conditions to which Rule 53 refers relate to the issues raised by the pleadings, not simply to the preliminary proceedings. *United States* v. *Kirkpatrick*, 186 F. 2d 393 (C.A. 3).

There is another flaw in the decision below. The Court of Appeals holds that this case has exceptional features (in the sense of Rule 53) and that therefore it was not an abuse of discretion for Judge Pine to refuse to modify the order of reference. But the plain fact is that Judge Pine did not purport to exercise discretion. Indeed, he found that reference of this case for trial by a master was not consistent with Rule 53, but that the Government had waived any right to object. On the assumption indulged by the Court of Appeals, *i.e.*, that the Government's plea for modification raised an issue of discretion, the

[6] Pre-trial proceedings are still in progress and the parties, at the same time, are actively preparing for trial; although matters have not yet reached the stage where it is practicable to set a trial date. There appears, at the present time, to be little or no likelihood of settlement of the litigation. It is expected that the case will have to be tried on its merits.

decision below suffers from the defect that such discretion must be exercised initially by the District Court, and not by the Court of Appeals. *Maxwell* v. *Enterprise Wallpaper*, 131 F. 2d 400, 403 (C.A. 3).

2. The Government did not, as Judge Pine believed, waive its right to object.

An interlocutory order prescribing a method of procedure is not a binding contract which precludes a party, who initially consented to the order from seeking a modification at any time or in any circumstances. Even a *final* consent judgment or decree which determines *substantive* rights may be modified in appropriate circumstances. *United States* v. *Swift & Co.*, 286 U.S. 106, 114–115. If the District Court believed (as Judge Pine did) that the order of reference was contrary to the purposes of Rule 53, it was incumbent upon the court to set matters right, *Simmons Co.* v. *Grier Bros.*, 258 U.S. 82, at least where it appeared that modification would not cause prejudice to any party and that altered circumstances reinforced the prayer for relief.

We stress that the functions of the master here have been thus far confined to the supervision of discovery proceedings and depositions, and that he has not heard or considered any issues of fact raised by the pleadings. As Judge Fahy stated in his dissent (App. A, pp. 20–21):

> * * * Nothing heretofore done by the master would be set aside by the modification requested. Nor would additional pretrial matters which lie in the future be removed from the master's jurisdiction. It is the actual trial itself, still

to be held, that would be restored to the responsibility of the court.

We emphasize further that there has been a most significant change of circumstances since the order of reference was originally entered. At that time, the Government believed that discovery would be a two-way street and that the United States, which was prepared to make full disclosure to respondent (as it has since done), would enjoy, for its part, the benefits of full production by respondent. Respondent, as matters have developed, has not made a complete disclosure, and, for aught that appears, the most vital clues to respondent's affairs may be contained in the banking records which remain inaccessible. It is one thing to make out the defense of "cloaking" when one is able to demonstrate by documentary proof the full story of the economic and financial arrangements made. It is quite another matter to show that transactions are colorable when the party asserting their *bona fides* is in a position to draw the veil upon vital aspects of the dealings. To the extent that documentation is incomplete, there is a correspondingly greater need for passing upon questions of testimonial credibility and a far larger role for inference. This Court has already recognized that trial of this case without full disclosure by respondent creates serious and novel problems. 357 U.S. at 212–213. Thus, it observed (p. 213) that "in the absence of complete disclosure by [respondent], the District Court [might] be justified in drawing inferences unfavorable to [respondent] as to particular events." We submit that it has become vitally important to the proper conduct of the litigation that both judgments as to credibility and the

drawing of inferences from the record be made in the first instance by a trial judge, and that he should not view the case, one step removed, under the formidable limitations imposed by the "clearly erroneous" rule.[1] Certainly, when this case was initially referred to a master, it could not have been contemplated either by Judge Laws or by the parties that it would involve the kind of trial which has now become necessary as a result of supervening developments.

CONCLUSION

The District Court has reached the plainly erroneous conclusion that, although this case is one which should be tried by a District Judge, the court is now powerless to direct that course. Court of Appeals has ruled, on the other hand, that this is the type of case which it is appropriate to refer, in its entirety, to a master—a ruling which, we believe, is in direct conflict with a controlling decision of this Court.

This petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
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Special Assistant to the Attorney General.

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Assistant to the Solicitor General.

IRVING JAFFE,
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SEPTEMBER 1960.

[1] It may be added that this Court's *LaBuy* decision, clarifying Rule 53, was itself a change in circumstance justifying reconsideration of the order of reference.

APPENDIX A

1. *Opinion of the Court of Appeals*

United States Court of Appeals for the
District of Columbia Circuit

No. 15017

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., APPELLANTS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., AND ERIC G. KAUFMAN, ET AL., APPELLEES

APPEAL FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided April 14, 1960

Before WILBUR K. MILLER, FAHY and DANAHER,
Circuit Judges

DANAHER, *Circuit Judge:* This unique case brought by a Swiss holding company sometimes known as I. G. Chemie or Interhandel [plaintiff], was instituted in October, 1948 under the Trading with the Enemy Act, 50 U.S.C. App. § 9(a), 40 Stat. 419, as amended, against the Attorney General, as successor to the Alien Property Custodian, and the Treasurer of the United States [herein Government]. Hun-

dreds of plaintiff's stockholders intervened.[1] Thereafter, many variously contested proceedings resulted in hearings before each of several District Judges. Chief Judge Laws was finally impelled, *sua sponte*, to consider the appointment of a special master. The record shows that he had consulted his District Judges and had canvassed his plan with counsel. He asked that Chief Judge Knox in the Southern District be consulted to ascertain his practice. Plaintiff's counsel objected to a reference of the case to a special master and formally opposed his appointment. It was argued that the many issues should be decided by a judge and that the reference was beyond the power of the court.

Chief Judge Laws ordered a pretrial hearing whereat counsel could be fully heard. The parties were requested to file proposed orders designed to accomplish the result outlined by Chief Judge Laws. The Government submitted its proposed order. It asked that there be included a provision that "The master's report shall contain findings of fact and conclusions of law," and further that "The master's findings of fact shall have the force provided in Rule 53(e)(2)."

After considering the existence of need based upon the protracted testimony of witnesses in the United States as well as abroad, and other matters, and finding "exceptional circumstances," Chief Judge Laws on February 14, 1950 entered his order appointing as special master William J. Hughes, Esquire, to whom he referred "the determination and findings of all is-

[1] As appellees they presently appear in three groups, formed pursuant to the Supreme Court's decision in *Kaufman* v. *Societe Internationale*, 343 U.S. 156 (1952). Some understanding of the nature of the issues still largely unresolved may be gleaned from that opinion.

sues of fact and law involved in said action * * *.'"[2]

Plaintiff's counsel after the order was entered again noted objection to the reference and a year later sought to vacate and revoke the order. Thereupon the Government opposed the plaintiff's motion for revocation contending that the order was entirely proper "in view of the exceptional circumstances of this case." The Government's opposition further noted that "Plaintiff confuses the reference of all issues with their reference for *final decision*. The reference of all issues is permissible, but it is not permissible to refer them for a final decision * * *. The specific mention of Rule 53(e)(2) in the order of reference made it clear that the court was not referring to the Master the making of a final decision. Since, under the order and the Rule, the Master's report will come back to the court for adoption or rejection, no impropriety was committed.'" The court, adopting the position then urged by the Government, denied the plaintiff's motion to vacate the order. Thereafter the respective parties proceeded under the order of reference. More than 140 docket entries reflect various proceedings and the actions taken over the years.

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[2] The order of reference further read: "The Master shall have all the powers and duties which by law may be conferred upon or exercised by a master. His findings of fact shall have the force provided in Rule 53(e)(2) of the Federal Rules of Civil Procedure. He shall hear and pass upon all motions hereafter filed except motions to vary orders already made, motions to punish for contempt, or other motions which would change the nature of the action or of this reference. He shall attend the taking of all depositions and discovery proceedings where witnesses are to be examined, except upon written stipulation of counsel or order of Court. He shall also have power to redetermine the time of taking depositions and resuming the deposition of Hans Sturzenegger now suspended."

On October 1, 1958, the Government moved that the reference be terminated on the ground that the District Court "lacks authority to continue such reference." Alternatively, it asked that the original order be modified "to limit the scope of the reference and the authority of the Master to the conduct and supervision of discovery proceedings authorized by the Court and depositions." The latter motion came on before Chief Judge Pine who, substantially throughout the interim, had served as special judge. After full hearing and argument, an order was entered denying the Government's motion in its entirety. Judge Pine pronounced his opinion and found as his order recited, that the ruling properly should be reviewed forthwith as coming within the special class of interlocutory orders justifying an immediate appeal, pursuant to 28 U.S.C. § 1292(b) (1958). We allowed this appeal accordingly and are satisfied that the case is properly here.[3]

The Government assails Judge Pine's order as an abuse of discretion. Relying largely upon *LaBuy* v. *Howes Leather Co.*,[4] the Government argues that the factors there predicating the reference greatly outweighed those considerations which actuated Judge Laws' order of reference. In effect, it is thus argued if the *LaBuy* situation could not support a reference as the Supreme Court said, the instant reference must fall.

Quite overlooked is the extreme caution with which Judge Laws explored the situation here before he acted. Obviously familiar with the basic problem as his experience with earlier comparable cases had

[3] Cf. *Milbert* v. *Bison Laboratories*, 260 F. 2d 431 (3 Cir. 1958).

[4] 352 U.S. 249 (1957). There the Court was concerned with the *power* of a Court of Appeals to issue its writ of mandamus to compel a District Judge to vacate certain orders of reference.

taught, he not only did not abdicate the judicial function, but contemplated that the parties should have recourse to the court as to the master's rulings. We think that factually, as we shall show, and under the law which is intended to govern the reference, the circumstances in the instant case are totally different from *LaBuy*.

As the Supreme Court observed in *Societe Internationale* v. *Rogers*,[5] "This issue comes to us in the context of an intricate litigation." We think that if ever there is to be a case presenting itself as "the exception and not the rule,"[6] it is this one. At stake are claims evaluated at more than $100 million, consisting of cash in American banks and about 90% of the capital stock of General Aniline & Film Corporation, control over all of which had been asserted by the Alien Property Custodian as assets "owned by or held for the benefit of" I. G. Farbenindustrie, said to be a German enemy national. Before the Government in 1958 filed the motion now considered, various groups of intervenors, appellees here, over the years had presented their claims. Some 2,488 stockholders were claimants at one time or other, in fact the complaints of some 720 had been dismissed.[7] The action of the corporate appellee, the plaintiff, previously dismissed by us[8] was reinstated by the Supreme Court.[9] This is no *LaBuy* case.

Moreover it is not always so, even when some doubt has been urged, that an order of reference must be

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[5] 357 U.S. 197, 198 (1958).

[6] Fed. R. Civ. P. 53(b).

[7] Further particulars may be perceived in *Kaufman* v. *Brownell*, 101 U.S. App. D.C. 147, 247 F. 2d 553, *cert. denied*, 355 U.S. 842 (1957).

[8] 100 U.S. App. D.C. 148, 243 F. 2d 254 (1957).

[9] *Supra* note 4; and see as to other complications reaching the courts, cases cited in *Kaufman* v. *Brownell*, *supra* note 7.

vacated. In the *Tendler* case,[10] we noted that the master had conducted eleven hearings over a considerable period of time. Here the litigation has evolved over some twelve years, and rights and the status of many claims and the positions of the respective parties have turned upon what has been done. As Judge Pine observed, "so many actions have been taken that to limit the scope as prayed would change the whole pattern of the proceedings and cause confusion and uncertainty in many aspects of this complicated case which are now impossible to visualize."

The order of reference[11] expressly specifies that the master is to have only the powers and duties "which by law may be conferred upon or exercised by a master." We have heretofore recognized "that it is the trial court in such a case who makes the final determination of all the issues * * *. And in no instance is * * * [the judge] bound by the master's conclusions of law."[12] In our case Judge Pine, as special judge, is and for ten years has been available upon proper application and showing by the parties to grant supervision as to any challenged action. The numerous occasions upon which recourse has been had to the courts demonstrate no lack of remedy if it be necessary to seek guidance.

Again, even as to the master's ultimate report, objections conformably to the Rule shall be subject to hearing, to modification, rejection and even to the receipt of further evidence.[13] Nor should it be over-

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[10] See *Tendler* v. *Jaffe*, 92 U.S. App. D.C. 2, 203 F. 2d 14, *cert. denied*, 346 U.S. 817 (1953).

[11] *Supra* note 2.

[12] *D. M. W. Contracting Co.* v. *Stolz*, 81 U.S. App. D.C. 334, 336, 158 F. 2d 405, 407 (1946), *cert. denied*, 330 U.S. 839 (1947).

[13] Fed. R. Civ. P. 53(e)(2). And see note 2 *supra*, and 5 Moore, Federal Practice 2968 *et seq.* (1951).

looked that the evidence in the case is largely documentary. Of course, the trial judge in this equity action may apply the rule in *United States* v. *Gypsum Co.*[14] and so may we.[15]

Since we are satisfied for the reasons stated that there was no abuse of discretion by the trial judge, we need not consider the Government's claim that under the Rules no waiver here occurred. We note only that the appellees were the parties who ten years ago opposed and even later sought to revoke the order of reference. The Government then supported the order, as we have seen, and all parties have since acted pursuant thereto.

We find no error.

Affirmed.

FAHY, *Circuit Judge, dissenting:* Insofar as the pretrial features of the case are concerned—including discovery and the taking of depositions here and abroad with rulings incident to the conduct of those proceedings—no modification of the reference of the case to the master is now pressed by appellants. But the reference also includes "the determination and findings of all issues of fact and law involved in said action," so that the master would actually try and initially decide the case. Our question is whether, on appellants' motion of October 1, 1958, the reference should be modified so that the master's duties would not include authority for making determinations and findings on all issues of fact and law. Nothing heretofore done by the master would be set aside by the modification requested. Nor would additional pretrial matters which lie in the future be removed from the master's jurisdiction. It is the actual trial itself, still to be held,

[14] 333 U.S. 364, 395 (1948).

[15] *Dollar* v. *Land*, 87 U.S. App. D.C. 214, 217, 184 F. 2d 245, 248, *cert. denied*, 340 U.S. 884 (1950).

that would be restored to the responsibility of the court.

At the time of the original reference the defendants who were the predecessors of the present appellants sought the reference in its broad scope. Appellees then opposed it. Thus, the positions of the parties have changed. Appellants now seek modification; appellees now defend the reference in its original scope. I attach little importance to this reversal of positions, especially as the modification now sought would not undo the past, or indeed alter the future course of the case except as to the basic determinations and findings. These I think should be made initially by the court, not by a master whose findings of fact would bind the court unless clearly erroneous. Rule 53(e)(2) Fed. R. Civ. P.

I am not able to reconcile the contrary view with the decision of the Supreme Court in *LaBuy v. Howes Leather Co.*, 352 U.S. 249, rendered subsequent to Chief Judge Laws' order of reference. In *LaBuy* the Court upheld the Court of Appeals in using the extraordinary writ of mandamus to require a District Judge to vacate orders of reference in an antitrust action.[1] The references covered the taking of evidence, trial of the case, and the preparation of findings of fact and conclusions of law. In holding that the District Court had abused the discretion available to it under Rule 53(b), the Court said the references

> amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation.[1]

[1] 352 U.S. at 256. Mr. Justice Brennan wrote a dissenting opinion in which Mr. Justice Frankfurter, Mr. Justice Burton and Mr. Justice Harlan joined. The dissent, however, was limited to the use of the extraordinary writ of mandamus at an interlocutory stage of the case—a question not involved in the

Moreover, no exceptional circumstance within the meaning of Rule 53(b) was found in *LaBuy* to reside in court congestion in itself, as to which the Court said,

> if such were the test, present congestion would make references the rule rather than the exception.

352 U.S. at 259. Nor did the fact that the case had "unusual complexity of issues of both fact and law," or the circumstance that the trial would be prolonged, create "some exceptional condition" within the meaning of the reference Rule. As to those characteristics of the case the Court said:

> But most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court. On the contrary, we believe that this is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work. Nor does petitioner's claim of the great length of time these trials will require offer exceptional grounds.[2]

When I apply these principles to our case I am unable to make a reasoned distinction in favor of the broad scope of the present reference. Indeed, this case seems more clearly than *LaBuy* one for trial by and in a federal court, rather than by a master.

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instant case, since the interlocutory appeal is before us in appropriate manner under 28 U.S.C. § 1292(b) (1958).

[2] 352 U.S. at 259. The Court agreed, however, that the detailed accounting required in the case to determine the damages suffered by each plaintiff might be referred to a master after the court had determined the question of liability of all defendants, "provided the circumstances indicate that the use of the court's time is not warranted in receiving the proof and making the tabulation." *Ibid.*

especially under the limitations a trial by a master would impose upon the final conclusions of the court as to the facts, by reason of Rule 53(e)(2).

The case is one of large importance, with international as well as domestic ramifications.[3] The sound solution would seem to be to permit the master to conclude the pretrial proceedings, with such court supervision as from time to time may be necessary, and then for the trial itself to come on before the court. While the case has exceptional features, and the aid of the master I think is properly utilized, there is no such exceptional condition affecting the basic issues to be determined, chiefly that of enemy taint, as justifies the court in referring those issues to the master.

The clear teaching of *LaBuy*, as it seems to me, is that "some exceptional condition," as that restrictive term is used in Rule 53, is not met by a showing that the case is an exception to the general run of litigation in that it is complex and will take a great deal of time.[4] Nor, as we have seen, does court congestion in itself create the exceptional condition essential to support a reference. A condition which justifies a reference, either of the whole or a part of a case, must be exceptional in the sense of being peculiarly appro-

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[3] For the prior judicial history of the litigation see *Societe Internationale* v. *McGrath*, 86 U.S. App. D.C. 157, 180 F. 2d 406; *Kaufman* v. *Societe Internationale*, 88 U.S. App. D.C. 296, 188 F. 2d 1017; *rev'd*, 343 U.S. 156; *Societe Internationale* v. *Brownell*, 96 U.S. App. D.C. 232, 225 F. 2d 532, *cert. denied*, 350 U.S. 937; *Societe Internationale* v. *Brownell*, 100 U.S. App. D.C. 148, 243 F. 2d 254, *rev'd. sub nom. Societe Internationale* v. *Rogers*, 357 U.S. 197; *Kaufman* v. *Brownell*, 101 U.S. App. D.C. 147, 247 F. 2d 553, *cert. denied*, 355 U.S. 842; *Interhandel Case*, [1959] I.C.J. Rep. 6.

[4] A great deal of time is in fact being saved by the proper use of the master in the pretrial proceedings.

priate for initial disposition by a master, rather than being of a nature inherently and predominantly appropriate for the exercise of a court's own decisional function. The case of *Tendler* v. *Jaffe*, 92 U.S. App. D.C. 2, 203 F. 2d 14, *cert. denied*, 346 U.S. 817, is perhaps illustrative of a proper reference, though that case too was decided before *LaBuy*. Rule 53 itself is also suggestive in its mention of accounting as an appropriate matter for reference. One need not attempt in the abstract to enumerate illustrations, for the problem before us is a concrete one. As to that problem, I do not find any exceptional condition which justifies turning to a master for determinations or findings with respect to the basic issues in the case. Those are for decision by the court, free of the "clearly erroneous" restriction of Rule 53(e)(2). In the end this would be the most satisfactory manner of disposing of this case, and I think it is as well the required manner.

I would reverse and remand.

2. *Judgment of the Court of Appeals*

United States Court of Appeals for the District of Columbia Circuit

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No. 15017—September Term, 1959

Civil 4360–48

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., APPELLANTS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., AND ERIC G. KAUFMAN, ET AL., APPELLEES

Appeal from an Interlocutory Order of the United States District Court for the District of Columbia.

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the order of the District Court on appeal in this cause is affirmed.

Per CIRCUIT JUDGE DANAHER.

Dated April 14, 1960.

Separate dissenting opinion by Circuit Judge Fahy.

3. *Order of the Court of Appeals denying rehearing*

United States Court of Appeals for the District of Columbia Circuit

No. 15017—September Term, 1959

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., AND ERIC G. KAUFMAN, ET AL., APPELLEES

Before PRETTYMAN, Chief Judge, EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges, in Chambers

Order

Upon consideration of appellants' petition for a rehearing in banc and of the opposition thereto, it is

ORDERED by the court that the petition for rehearing in banc is denied.

Per Curiam.

Dated May 11, 1960.

Circuit Judge BAZELON did not participate in this order.

APPENDIX B

Oral Opinion of the District Court

The COURT: Gentlemen, as I stated at the outset of the arguments, I previously had an opportunity to to read the extensive and helpful briefs which were submitted. I also had the opportunity of reading what I believe to be the relevant portions of the record, although, as I told you, the record is very confused and some parts of it are not in this courthouse. I have also had the advantage of helpful arguments which have assisted me greatly, and I have, also, had the advantage of two hours in my chambers when I had time to think which is a rare privilege these days of expedited justice, and I am now ready to rule because I do not want it said that this case has been prolonged by procrastination of this judge, and I do not think the record shows any procrastination at any time on my part.

Now, the defendants have moved for an order terminating the reference to a special master for determination and findings on all issues of fact and law. The reference was made under an order entered February 14, 1950. The ground for the motion is that the Court lacks authority to continue the reference. In the alternative defendants move for an order modifying the order of reference to limit its scope and the authority of the master to the conduct and supervision of discovery proceedings.

I shall first consider the primary motion for a termination of the order of reference in its entirety. As stated, it is based on the ground that the court lacks authority to continue it. This presupposes a conclu-

sion that the court had authority to order the reference at the time it was ordered, but that the authority is lacking now. This in turn presupposes a conclusion that there has been a change in the law, and this appears to be the view of defendants when they state in their Points and Authorities that since the decision in the LaBuy case on January 14, 1957, the appointment of a master to hear a non-jury case in its entirety "may well constitute an abridgment of litigants rights." Furthermore, this is borne out by the fact that defense counsel stated that at the time of the appointment of the master in this case, the law on the subject was largely "unsettled." Therefore, their position seems to be, particularly as they do not move to vacate the order ab initio, that the court now lacks the "authority to continue the order" because of the LaBuy decision, and that the Court should proceed on a new basis henceforward and leave undisturbed what has been done before.

However, I do not agree that there has been a change in the law, for as I read the Federal Rule involved and the authorities, the opinion in the La Buy case did no more than restate and crystallize the law as it previously existed. Entertaining that view, if I terminated the reference, it would not be on the basis that the court now lacks authority, but necessarily on the basis that the Court lacked authority at the time the order was entered. The corollary of that would be that all the acts and decisions of the special master during the last nine years would be without authority and, therefore, a nullity, and would have to be reconsidered and decided by the court.

It is my opinion that the reference to the master in circumstances like the present would be contrary to the Federal Rule involved, if made over the objec-

tion of the parties, but certainly the rule can be waived, as the right to trial by jury, a right of the highest dignity, can be waived by the parties. Here the defendants consented to the order of reference, acquiesced in the order for over eight years, about two of which were after the decision in the La Buy case, during which time the master has made many decisions on many matters involving substance as well as procedure, and, also, defended the order of reference against challenge by the plaintiffs in the year 1951, I believe.

It is hardly conceivable that defendants can now take advantage of plaintiff's initial objection to the order. There has, therefore, been a waiver by defendants, both express and implied, and acquiescence, and opposition to efforts to have it set aside over a long period of years constituting a waiver by them of their right to have the issues decided initially by the Court.

So far as the plaintiffs are concerned, they objected to the entry of the order at the time it was made on grounds substantially the same as those now being made by the defendants. Now, however, the plaintiffs have reversed their position and are defending the reference against the challenge by defendants and thereby themselves now consent and acquiesce and have indeed acquiesced therein since 1951, and have waived their rights since that time.

I am, therefore, of the opinion that all parties to this controversy are now in a position where they may not challenge the order of reference because in law and in fact there has been a consent thereto and the primary motion to terminate the reference as of this time should be denied. I should also state, however, that defendants, in the oral argument, took the position they were not pressing the primary motion.

I shall now take up the alternative motion to limit the scope of reference to the conduct and supervision of discovery proceedings. The same reasoning applies to this alternative motion as applies to the primary motion except if the order of reference had in the beginning been limited in the manner now desired by defendants, it would not have been contrary to the Federal Rule involved and would have been sustainable with or without consent. However, in so limiting it I would otherwise terminate the order of reference, objection to which, as above stated, has been waived. In addition to all else, such an order would be similar to changing the rules in the middle of the game, which I think is frowned upon in many quarters, and so many actions have been taken that to limit the scope as prayed would change the whole pattern of the proceedings and cause confusion and uncertainty in many aspects of this complicated case which are now impossible to visualize. Too much water has gone over the dam to justify such a modification now.

In addition, the master has acquired, over the years, an extensive familiarity with the case which would be forever lost if I granted the alternative motion and this should weigh in the scales if defendants are correct in their argument that the ruling of the Court on their motion involves the exercise of discretion. I, therefore, deny the motion for alternative relief.

To sum up, assuming the order standing alone would have been contrary to the Federal Rule in question, the acts and conduct of the parties over the years after the order of reference constitute a waiver of the rule and consent to the reference, and there should be no change in the established order of procedure at this time. An act in assumed contravention of the rule does not make it a nullity when done under the circumstances here presented which constitute, as

I said, a waiver and consent, and defendants concede the matter is not jurisdictional, and that the use of the words "lacking in authority" in their motion were not well chosen. This disposition is further supported by the opinion of the U.S. Court of Appeals for the District of Columbia Circuit, in Parker against Sager, 174, Fed 2d, 3 and 4, where the Court said among other things, as follows:

> The brief of amici curiae asserts further that Sager is as a matter of law forbidden to take the inconsistent legal positions assertedly taken by him as above set forth. But the rule that a party is not permitted to maintain inconsistent legal positions in judicial proceedings is, according to the better view, subject to the limitation, among others, that the legal position first asserted must have been successfully maintained.

That is certainly applicable in this case. Now, that is my ruling, gentlemen. I realize it is a far reaching one if I should be in error and every nisi prius judge these days should realize there is always a strong possibility that he is.

I suggest that counsel consider this recent legislation of Public Law 85-919, approved on September 2, 1958. It appears on page 6763 of the 18 Supp to the United States Code, which reads as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if

> application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

A great deal of time, energy, and expense as I see it would be lost if I am in error. Because, all that has been done would have to be done over and I suggest to counsel the wisdom in considering that Statute in the light of my opinion.

Will you prepare appropriate order, gentlemen?

(The Court adjourned at 2:20 o'clock, February 6, 1959.)

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OFFICE SUPREME COURT, U.S.
FILED
OCT 7 1940
JAMES R. BROWNING, Clerk

Supreme Court of the United States

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT. SOCIETE INTERNATIONALE, ETC., IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 397

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the ALIEN PROPERTY CUSTODIAN, ET AL., *Petitioners*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., and ERIC G. KAUFMAN, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT, SOCIETE INTERNATIONALE, ETC., IN OPPOSITION

STATEMENT

The petition *properly* brings to this Court only a single question, namely, whether the district judge abused his discretion in refusing to modify an eight-year old order of reference entered by the late Chief Judge Laws upon a finding of exceptional conditions pursuant to Rule 53(b) of the Federal Rules of Civil Procedure.

Petitioners expressly committed their motion for modification to the discretion of the district judge and agreed that no question of validity of the order was involved. (See three remarks of petitioners' counsel at J.A.[1] 145, 146, 147, respectively; and two remarks of District Judge Pine at J.A. 150 in reliance thereon.) Petitioners' brief in the Court of Appeals presented the single question whether the district court had abused its discretion; and the majority opinion of the Court of Appeals addressed itself to that question, ruling in the negative (App. A to pet. p. 20).

Despite this background, petitioners seek in their "Question Presented" (pet. p. 2) to combine abuse and invalidity; and they suggest without basis on page 10 of their petition that the district judge did not purport to exercise discretion and that the Court of Appeals originated the "assumption" that petitioners' motion raised an issue of discretion.

ARGUMENT

There Was No Abuse of Discretion

On June 16, 1958, this Court vacated the judgment of dismissal and remanded this case to the district court (357 U.S. 197), indicating three alternatives which might be immediately pursued, one of which was for petitioners to propose and explore plans for fuller compliance with the discovery order.

Over two years and three months have elapsed since then, but petitioners have made no move in the direction suggested. Indeed, they have examined less than one-half of the approximately 250,000 Sturzenegger

[1] As to the petition, "J.A." when used in this opposition, refers to the joint appendix in the court below.

documents which have been tendered, and only in the spring of this year have petitioners made a start toward examining in Switzerland the books of the Sturzenegger Bank. (Compare, 357 U.S. 203.)

Despite the foregoing, petitioners convey to this Court the impression that there will be a substantial failure of production of relevant documents by this respondent, and that, therefore, a peculiar "kind of trial * * * has now become necessary as a result of supervening developments" (pet. p. 13). The plain fact is that petitioners are assuming a situation which they are not in a position to establish, and "for aught that appears"—to borrow their own phrase—may never occur. Apparently, petitioners, through inactivity or design, prefer to "cry 'wolf' " rather than to discover that nothing of importance is missing.

There is no substance to the claim that there has been a significant change of circumstances since the order of reference was originally entered. (See pet. pp. 12-13.) This point was not presented by petitioners to the district judge upon argument of their motion to modify the order of reference; and was merely alluded to nearly a month after the judge had announced his ruling and at a time when the parties appeared before Judge Dimock to settle the form of an order to implement his decision (J.A. 152-154).

In any event, the "drawing [of] inferences", which distuibs petitioners so much, is in the nature of a legal conclusion that the trial judge may, under Rule 53 F.R.Civ.P., re-evaluate. Ample latitude in this connection was recognized by the majority opinion of the Court of Appeals so as to assure petitioners that the ultimate decision at the trial level will be that of the

district judge and not that of the special master. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) and *Dollar* v. *Land*, 87 U.S. App. D.C. 214, 217, 184 F.2d 245, 248, *cert. denied*, 340 U.S. 884 (1950).[2]

Moreover, the apprehension expressed on page 12 of the petition is one which really applies to respondent, and respondent is content to take its chances with the special master. The inferences which may be drawn from "absence of complete disclosure" would be *unfavorable* to this respondent, not to petitioners (357 U.S. at 213).

The majority opinion of the Court of Appeals clearly demonstrates that the district judge did not abuse his discretion when he refused to modify the order of reference. In reasoning toward this result, the Court of Appeals found the case at bar to be dissimilar to *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249. On the other hand, Judge Fahy in his dissent has misconceived Chief Judge Laws' "exceptional circumstances [conditions]" for ordering the reference. Contrary to the statement appearing at the bottom of page 8 of the petition, none of the reasons advanced by Judge LaBuy was even mentioned by the late Chief Judge of the District Court. Different and more potent ones exist here;[3] and petitioners are wholly inaccurate when they assert that the reference in *LaBuy* was sought to be justified "on precisely the grounds which were accepted by the court below" (pet. pp. 8-9).

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[2] This answers one of two points urged by Judge Fahy in his dissent.

[3] As the majority reasoned, "if ever there is to be a case" for such a reference as Rule 53 clearly authorizes, this is it. Surely, with all respect to Judge Fahy, "this is no *LaBuy* case", as the majority commented.

The late Chief Judge Laws was concerned with the exceptional situation brought about by many of the witnesses and practically all of the documents being located abroad.

This case involves the history of conduct and acts of human beings and corporations occurring in Europe beginning with approximately 1920 and coming up at least to the end of World War II. Particularly, there are involved the relationships of men in Germany connected with the old Frankfurt firm of Metaligesellschaft and with the huge I. G. Farben combine on the one hand, and, on the other hand, Swiss individuals and business enterprises whose pivot was the banking house of H. Sturzenegger & Cie., and its predecessor, Eduard Greutert & Cie., of Basel. The Swiss-German transactions fanned out into Holland, Norway, France, Poland and elsewhere in Europe. There will be involved in the case the testimony of upwards of a hundred witnesses and many hundreds of thousands of documents, virtually all located abroad.

Petitioners are urging that the exceptional conditions that Chief Judge Laws envisaged were limited to the pretrial stage of discovery of evidence and inspection of documents (pet. p. 10). Plainly, Chief Judge Laws was not thinking so narrowly. In the first paragraph of his order of reference, the judge referred to matters relating to the "trial" of the case (J.A. 74), and in the hearing of April 1, 1949 he mentioned that the special master could preside over the proceedings both in Europe and in the United States (J.A. 59). As the judge pointed out in the April 1949 hearing, it was impossible for a judge to go to Switzerland (J.A. 63), and the only person who could stay with the case

from the beginning to the end, wherever there was any kind of a proceeding, would be one occupying the role of a special master. (Compare J.A. 59.) He could make rulings on the spot relating both to time and subject matter; his presiding over the taking of a deposition for perpetuation purposes could, at the same time, dispose of the testimony also for trial purposes; and ruling upon the relevance of a document sought for discovery might also involve trial relevance.

The locale of this case for virtually every purpose is Europe, not America; and with rare exceptions, the witnesses for trial purposes will actually be testifying and referring to documents there and not over here. If the great bulk of evidence in a case is to be developed and assembled by the deposition process, as distinguished from the average case where depositions are the exception and not the rule, there is a real advantage to the trier of the facts to preside over the depositions and thus be able to observe the conduct and demeanor of the witnesses on the stand.

Moreover, Chief Judge Laws' attention was called to the first special defense of petitioners and to the vastness of the inquiries which would be made in connection therewith. (This appears at pp. 14-16 of the transcript of April 1, 1949,[4] included in the record filed in the Court of Appeals but not printed in the Joint Appendix.) The claimed ownership of the General Aniline shares by this respondent was and is under attack by the petitioners in this defense, and the acquisition transactions involving millions of dollars would have to be revealed or ferreted out by way of account-

[4] The substance of these pages is largely a quotation from petitioners' First Separate Defense, which appears at J.A. 48-49.

ing evidence. This is not a case like *LaBuy*, where accounting proof was ancillary to the determination of a principal issue; here, the question of ownership, as based upon intricate accounting transactions, is itself an issue.

In addition to the series of individual problems which Chief Judge Laws envisaged, he grasped the fact that with so much of the case destined to be resolved on European soil, there was a grave chance that it would get out of hand if it were not under the control of one who was free to go wherever something was happening and who would take with him a knowledge of everything which had happened before. Chief Judge Laws' overall concern for the myriad problems which were bound to arise in this two-continent litigation reached its zenith when he announced from the Bench in April 1949 that he was considering the appointment of a master because he was determined "to save the reputation of the courts and everybody else concerned" (J.A. 61).

All of these things continue to exist and will for a long time to come.

The grounds of the charge of abuse of discretion are neither substantial nor real. District Judge Pine aptly phrased the situation in the following (J.A. 150):

> "In addition, the master has acquired, over the years, an extensive familiarity with the case which would be forever lost if I granted the alternative motion [for modification] and this should weigh in the scales if defendants [petitioners here] are correct in their argument that the ruling of the Court on their motion involves the exercise of dis-

cretion. I, therefore, deny the motion for alternative relief."

Indeed, the special master has acquired a vast store of knowledge of personalities, facts and figures involved in the case. Judge Pine recognized this in the foregoing, and wisely apprehended that it "would be forever lost" if he granted petitioners' motion (J.A. 150). Thus, harm could come to the case itself—that is, to its expedition, efficient handling and judicial acquaintanceship, and this obviously was an important consideration in the exercise of discretion by the district judge, even assuming *arguendo* that, as claimed on page 11 of the petition and as mentioned by Judge Fahy in his dissent, the functions of the special master have been thus far confined to the supervision of discovery proceedings and depositions.[5]

In undoubted exercise of a sound discretion not to modify the order of reference, Judge Pine employed the following phrases: that if he modified the order he would be "changing the rules in the middle of the game"; that the "whole pattern of the proceedings" would be changed and would "cause confusion and uncertainty in many aspects of this complicated case which are now impossible to visualize"; and that "too much water has gone over the dam to justify such a modification now" (J.A. 150).

[5] While it may be true that the master's functions have been thus limited insofar as this respondent's cause of action is concerned, his functions with relation to the intervenors have involved substantial questions of substance and procedure. (See intervenors' briefs in opposition.) Moreover, in presiding over a deposition that encompasses more than 6,000 pages, the master had the opportunity to observe factually the gamut of the case. (This deposition is referred to on page 4 of the petition.)

CONCLUSION

It is clear that what District Judge Pine decided was that he found no reason, either in law or in fact, which should prevail upon him to terminate or modify the reference order, and that everything presented to him was to the contrary. This respondent submits that the district judge is completely supported in this conclusion, and that nothing stated by petitioners even remotely approaches the charge of abuse. Judge Pine did not hold that he could not terminate or modify the reference order (see pet. p. 13); what he decided was that he found no reason to do so. Moreover, the Court of Appeals' ruling is in no sense in conflict with a controlling decision of this Court. The petition for a writ of certiorari should be denied.[6]

Respectfully submitted.

JOHN J. WILSON
815 15th Street, N. W.
Washington 5, D. C.

Attorney for Respondent,
Societe Internationale, etc.

October 8, 1960

[6] Understandably, petitioners do not maintain that the writ should be granted because the lower courts took the appropriate steps for the prosecution of an interlocutory appeal under 28 U.S.C. 1292(b).

OCT 10
JAMES R. BROWNING

IN THE

Supreme Court of the United States

October Term, 1960

No. 397

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS KAUFMAN, *ET AL.*, IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1960

No. 397

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., PETITIONERS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., AND ERIC G. KAUFMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS KAUFMAN, *ET AL.*, IN OPPOSITION

Respondents Eric G. Kaufman, *et al.*, intervenors below, respectfully request that the petition for a writ of certiorari be denied.

Question Presented

Whether the Court below erred in holding that the District Court did not abuse its discretion in refusing to modify, after eight years of proceedings, an order of reference to a Special Master so as to delete therefrom authority to

determine issues of fact and law, where the petitioners espoused, consented to, and defended the order of reference, where the Master has been hearing and deciding substantial issues of fact and of law and has acquired a unique familiarity with the case, and where there has been no change in circumstances during the intervening eight years.

Statement

The original order of reference, drafted by petitioners and actively espoused by them, was entered on February 14, 1950 (Pet. 4). Shortly after the chief attorney in charge of the case for the petitioners was changed, petitioners moved in October 1958 to terminate or to modify the aforesaid order of reference. The petitioners first urged before the District Court that the order of reference be terminated in its entirety as invalid. They later abandoned the motion to terminate the reference and asked only that it be modified, in the exercise of the District Court's discretion, so as to limit the scope of reference to the conduct and supervision of discovery proceedings (Pet. 29-30).

Respondent Societe Internationale Pour Participations Industrielles et Commerciales, S.A., etc. (hereinafter called "Chemie"), instituted suit in October 1948 under Section 9(a) of the Trading with the Enemy Act, as amended (40 Stat. 419 as amended, 50 U.S.C. App. 9(a)), to recover property seized by the Alien Property Custodian consisting of approximately 93 per cent of the stock in General Aniline & Film Corporation, New York, valued at more than $100,000,000 and cash of approximately $2,000,000 (J.A. 17-33). Petitioners' answer put in issue the asserted non-enemy status of the respondent corporation (See *Societe Inter-*

nationale, etc. v. *Rogers*, 357 U. S. 197). Respondents Kaufman and others represent some 1,700 stockholders of I. G. Chemie who have intervened, pursuant to this Court's decision in *Kaufman* v. *Societe Internationale, etc.*, 343 U. S. 156, and assert on behalf of all non-enemy stockholders a derivative claim for corporate recovery of that part of the vested assets which is proportionate to the non-enemy stock interest in Chemie.

In 1950, the petitioners, acting upon the suggestion of the late Chief Judge Laws, actively espoused, prepared, and secured a general reference (J.A. 74-76)[1] of the case to a Special Master (J.A. 67, 70, 72-74, 162-3). In 1951 they defended the reference against efforts to vacate it (J.A. 84-5).

Following the intervention of Kaufman pursuant to the mandate of this Court, petitioners thereafter initiated and conducted motions and proceedings relating to the intervenors (*e.g.* J.A. 102). The intervenors, all of whom adopted the reference, did likewise (*e.g.* J.A. 87). It may fairly be said, that as to all matters affecting the claim in intervention, all of the parties thereto joined in, adopted, consented to and acted under the order of reference as signed by Judge Laws. Many matters of substance were presented to the Special Master from time to time, both by the petitioners and the various respondents. In now seeking to modify the order of reference the petitioners made no showing of any change in circumstances other than a

[1] The order of reference provided in part, "that William J. Hughes, Jr., Esquire, a member of the bar of this Court, is hereby appointed Special Master and there is referred to him as such the determination and findings of all issues of fact and law involved in said action excepting only those in the proceedings in intervention now on trial in this Court" (J.A. 75).

change in government counsel. The District Court, in exercising its discretion, denied the motion for modification (Pet. 30). The Court of Appeals affirmed (Pet. 14-24).

Reasons for Denying the Writ

There are no considerations involved in this case justifying review by this Court.

The decision of the Court of Appeals is not in conflict with that of any other court of appeals. The Court of Appeals has not decided an important question of federal law nor is its decision in conflict with applicable decisions of this Court. Further, the decision of the Court of Appeals does not involve any departure from the accepted and usual course of judicial proceedings.

The considerations involved in *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 are not present here.[2] In *La Buy*, an order of general reference was issued *sua sponte* over the objections of all the parties. Thereafter prompt action was taken to challenge and vacate the order. Here, the petitioners not only consented to but actively espoused and sought the order of reference. Thereafter, all of the parties accepted the reference and operated under it. A general reference to a Master on consent is valid and binding, whatever the rule may be in the absence of consent. *Kimberly* v. *Arms*, 129 U. S. 512. *See* Kaufman, *Masters*

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[2] A major consideration which led this Court to review the *La Buy* case was the question when courts of appeals could issue interlocutory writs of mandamus to correct abusive references under F.R.C.P. 53. See 352 U.S. 249, 250, 260. That question is not present in this case and is in any event largely mooted by the Interlocutory Appeals Act of 1958, 28 U.S.C. 1292(b).

in the Federal Courts: Rule 53, 58 Columbia Law Review 452, 454. The order of reference entered here was therefore clearly validly issued. Indeed, the petitioners implicitly recognized the validity of the original order of reference when they abandoned their motion to terminate and set aside the order and limited their motion to a request for modification in the exercise of the District Court's discretion.

Stripped of its wrappings, therefore, the only question before the Court of Appeals was whether the District Court abused its discretion in refusing to modify the order of reference after all of the parties had accepted and operated under it for a period of over eight years and when there was no showing of any change in circumstances other than the identity of the chief attorney in charge of the case for the petitioners. Whether the order of reference should be modified at this late date does not present a question which calls for review by this Court.

Judge Pine, the District Judge, held, rightly, in the exercise of his discretion, that modification of the order of reference would "cause confusion and uncertainty in many aspects of this complicated case which are now impossible to visualize" and that "too much water has gone over the dam to justify such a modification now" (J.A. 150).

For example, practically all of the proceedings affecting the intervenors have been before the Master. Both the petitioners and the intervenors took the initiative in bringing a myriad of matters before the Master; no one questioned the propriety of his control over the case. As a result of these proceedings, the Master has swept away much of the underbrush and laid down ground rules, affect-

ing the claims in intervention. Indeed, practically every phase of the intervention proceedings was permeated with questions of substantive law. It was the Master who confirmed that the claims of intervenors could be maintained by way of a derivative action as well as individually (J.A. 116). After full argument concerning the legal nature of the intervention claims, he ruled on the impact of the Assignment of Claims Act, 31 U.S.C. 203, on transfers of stock in Chemie after the vesting (J.A. 122). He presided over a series of pre-trial hearings to outline the issues for trial of the intervenors' claims (J.A. 12-16 and 166-217). And he defined the proof necessary and the extent of recovery under the *Kaufman* decision, 343 U. S. 156. In addition, there came before the Master a constant stream of motions, interrogatories and hearings concerning the diverse problems of individual Chemie stockholders (see J.A. 9-15).

Because much of the evidence in this case will inevitably be in the form of interrogatory, deposition and discovery and not in the form of testimony at the trial, the impressions gained by, and the determinations of the Master on all phases of the case patently are as significant, if not more significant, than determinations to be made on trial. They relate, indeed, directly to the main issue in the case, the freedom from enemy status or t: .t of the company by reason of its management, its ownership and its relationship with enemies. Insofar as the position of stockholders is concerned, the greatest part of the hearing of their claims and adjudication of their rights may well have taken place before the formal trial. To start afresh may well be prejudicial to the interest of the non-enemy stockholders.

For these reasons, the normal distinction between pre-trial proceedings and trial, especially after ten years, is inapplicable to this unprecedented case.

The Master here with the consent of all parties over a period of eight years has acquired a unique familiarity with all phases of this exceptional litigation and has become the person best acquainted with its complexities. It is with good reason that the District Court in exercising its discretion noted as a major consideration against modification that the Master's extensive familiarity with the case "acquired over the years . . . would be forever lost" (J.A. 150) if the requested modification were granted.

No one will dispute that this case is unique and that its issues are no longer of general significance. This is the only remaining vested property case of great substance under the Trading with the Enemy Act. It involves the issue of the enemy or non-enemy character of a particular publicly owned Swiss corporation and, if the corporation perchance is not entitled to a total recovery, the rights of its non-enemy stockholders. Since the issuance of the order of reference, the issues have become even more complicated by reason of the intervention of non-enemy stockholders. The Government, when it espoused the reference and defended it against an attempt to vacate it, recognized that on every score the case warranted the flexible, consistent and knowledgeable guiding hand of a special master. The Government also manifestly knew that under F.R.C.P. 53 (e)(2), the "clearly erroneous" rule applied to findings of fact of the Master. Yet it was content then, and since, *i.e.*, from 1950 to 1958, to have the case fully tried by a Special Master.

As Professor Moore has put it: "In the absence of some such [timely] objection, proceeding before the master constitutes a waiver of any potential objection to the reference". 5 Moore's Federal Practice (2d ed.), 2947. Petitioners' conduct and proceedings before the Special Master may fairly be said to constitute more than a waiver, and be tantamount to estoppel.

Even assuming there were authority for modification of this order of reference at this late date, such modification would be a matter within the discretion of the District Court. The Court of Appeals has found that there was no abuse of discretion. No cogent reasons have been advanced to justify a contrary finding. This should end the matter.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 287

IN THE

Supreme Court of the United States

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS, ERNEST ATTENHOFER, ET AL., IN OPPOSITION

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BRIEF FOR RESPONDENTS, ERNEST ATTENHOFER, ET AL., IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (J.A.[1] 147-152) is unreported.

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[1] "J.A." refers to the Joint Appendix filed in the court below.

The opinion of the Court of Appeals is reported at 278 F. 2d 268.

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1960. A petition for re-hearing *en banc* was denied on May 11, 1960. The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Black, on August 4, 1960, to and including September 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the refusal of the courts below to modify a prior order referring the case to a Special Master with the responsibility for making findings of fact and conclusions of law subject to the requirements of Rule 53 of the Federal Rules of Civil Procedure constituted an abuse of discretion.

RULE INVOLVED

Rule 53 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

* * * * *

> (b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

* * * * *

STATEMENT

Respondent Societe Internationale etc., a Swiss Corporation known as Interhandel, filed suit in the United States District Court for the District of Columbia in October, 1948 under Section 9(a) of the Trading with the Enemy Act, as amended, [40 Stat. 419, as amended, 50 U.S.C. App. 9 (a)], to recover property vested by petitioner's predecessors consisting of approximately 93% of the stock of General Aniline and Film Corporation and certain cash in New York banks of a total value in excess of $100,000,000 (J.A. 17-33). Petitioners' Answer denied respondent's claim of ownership, alleged that respondent is an enemy and or enemy-tainted and asserted certain counterclaims for unpaid taxes, etc.

On January 18, 1949, petitioners moved for the designation of a judge to hear and superintend all matters in this case preliminary to trial (J.A. 56-57). This motion was not acted on until July 5, 1949, at which time it was denied without prejudice (J.A. 64).

Meanwhile, in April, 1949, during hearings on motions relating to discovery and depositions in connection therewith, the late Chief Judge Bolitha J. Laws *sua sponte* suggested the appointment of a special master (J.A. 67-74).

Petitioners' counsel warmly embraced the Chief Judge's suggestion (J.A. 67-74). Chief Judge Laws scheduled a hearing for February 6, 1950, at which time he stated he would hear both sides with respect to the appointment of a special master (J.A. 65-66).

On February 13, 1950, counsel for petitioners wrote Chief Judge Laws a letter stating petitioners were

"glad" to note their consent to the proposed order and suggesting that Chief Judge Laws might wish to amplify the order by providing that the master's report should contain findings of fact and conclusions of law and that it might serve to clarify the order if the court would add to it a provision that the master's findings of fact shall have the force provided in Rule 53 (e) (2) (J.A. 162-164).

Thereafter, on February 14, 1950, Chief Judge Laws signed an order appointing William J. Hughes, Jr., a lawyer of great experience and recognized ability, as Special Master with the full consent and enthusiastic endorsement of petitioners. (J.A. 162).

Shortly thereafter, Mr. Hughes commenced his duties as Special Master and has ably and conscientiously functioned in that capacity to the present time. On January 4, 1951, Chief Judge Laws designated Judge (now Chief Judge) David A. Pine as the District Judge specially assigned to hear proceedings in this case.

On March 14, 1950, some 16 months after this litigation had commenced, respondents Kaufman, et al. sought to intervene in the suit alleging that respondent Interhandel was entitled to the return of that portion of the vested property which is proportionate to the interest in the Corporation held by non-enemies even if the Corporation were ultimately determined to be enemy or enemy-tainted. The District Court denied the Kaufman motion to intervene, the Court of Appeals affirmed (88 U.S. App. D.C. 296, 188 F. 2d 1017) and this Court reversed directing that Kaufman's derivative complaint in intervention be filed. 343 U.S. 156.

On June 16, 1952, respondents Attenhofer, et al. filed a motion to intervene (J.A. 4). Attenhofer and their adherents were permitted to intervene and on August 14, 1952, their complaint was filed (J.A. 5). Thus, the Special Master had already functioned for nearly two years before respondents Attenhofer, et al. became parties to the litigation.

Counsel for respondent Interhandel originally opposed the reference of this case to a Special Master (J.A. 76-78); and on February 19, 1951, over a year after the Special Master was appointed, again moved to vacate the order of reference (J.A. 80-83, 165). Petitioners opposed this new motion by respondent Interhandel and again embraced and endorsed Chief Judge Law's action in having signed the order of reference (J.A. 84-85). This latter motion of respondent Interhandel's was apparently overlooked by all concerned and no order was entered expressly overruling it. However, the motion was abandoned in the same year of 1951 and respondent Interhandel, as well as all other parties, have acquiesced in the appointment and functioning of the special master during the nearly nine years in which the case has been pending since that time (J.A. 137-138).

The Special Master has devoted a substantial amount of time to this case and has gained great familiarity with its complexities since the order of reference was signed. He has dealt with both substantive and procedural questions (J.A. 2-16, 87, 99, 102, 105, 112, 123, 125).

ARGUMENT

Petitioners' Contention

Certiorari is sought in this case to review the action of the District Judge denying a modification of an order of reference under Rule 53(b) of the Federal Rules of Civil Procedure, which had been in effect for over eight years. Respondents had heretofore believed, as did the Court of Appeals, that petitioners were grounding their appeal from the District Judge's action on a claim of abuse of discretion. However, since petitioners now claim (Pet., p. 12) the District Judge did not exercise discretion and that the Court of Appeals indulged an "assumption", we respectfully invite this Court's attention to the record.

In oral argument before the District Judge, petitioners' attorney stated: "* * * I am asking in the discretion of the Court that an order be made here * * *." (J.A. 145). He also stated "* * * I ask you in exercising your discretion * * * that you modify the order * * *." (J.A. 146) He stated "I am asking for a modification in the discretion of the Court" (J.A. 147). He finally stated: "* * * Coming now to the legal points involved, they hinge on the abuse of discretion" (J.A. 152). Furthermore, the District Judge made it clear in his opinion (J.A. 150) that he was exercising his discretion in denying petitioners' motion.

The District Judge Did Not Abuse His Discretion

There is no history in the District of Columbia of District judges generally or of the late Chief Judge Laws in particular indulging in the bad habit of promiscuously referring cases to masters. Even petitioners concede that "Judge Laws did not reach his

decision lightly." (Pet. p. 9). Thus, one of the main concerns confronting this Court in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, is lacking in this case.

More importantly, the instant case is clearly distinguishable from *La Buy* on factual grounds. The situs of *La Buy* was in the United States. Its parties resided in the United States, its witnesses were located in the United States,[2] its documents were to be found in the United States, and its issues involved typical and ordinary business transactions in the United States under American laws. *La Buy* was an anti-trust case and such cases are relatively common in those federal district courts located in our larger cities. In addition, although a detailed accounting might have been required were liability to be established, it would have been an accounting which was ancillary to the other and major issues of the case.

The majority of the Court of Appeals quite properly found the case at bar to be vastly dissimilar to *La Buy* and found that the District Judge exercised a proper discretion in refusing to modify the order of reference. For example, the instant case has its true situs in Europe and other foreign countries. Respondent Interhandel is a Swiss corporation located and domiciled in Basel, Switzerland. Its books, records, officers and employees are located in Switzerland. Petitioners' Answer to the Complaint charges (J.A. 48) a 17-year history of dealing with German and other European individuals and business entities amounting to a "conspiracy or common plan * * * to conceal, camouflage and cloak the ownership, control, and domination by

[2] Most of them apparently were in and about the City of Chicago. See Transcript of Record, No. 27, October Term, 1956, pp. 59 to 130.

I. G. Farben of properties and interests in many countries of the world * * * "

It has been estimated there will be upwards of 100 witnesses whose testimony will be produced and over 250,000 documents, many of them handwritten and most of them in foreign languages, will have to be inspected. The vast majority of these witnesses and documents are located abroad. The subpoena power of the District Court cannot reach those that are not in Respondent Interhandel's custody or control. Obviously, a district judge cannot journey abroad to supervise and try various aspects of a case where his presence would further the interests of justice. The Special Master, on the other hand, can and will go wherever the exigencies of the case require him to be.

Petitioners Answer to the Complaint also raises another important consideration which differentiates the case at bar from *La Buy*. Petitioners deny respondent Interhandel's ownership of the claimed General Aniline shares. Behind this claim of ownership are a large number of intricate transactions between numerous persons involving millions of dollars which will have to be carefully traced through accounting evidence. This question of ownership of the vested property is, under Section 9(a) of the Trading With The Enemy Act, *supra*, one of the basic issues in the litigation—it is not, as in *La Buy*, ancillary to the main case.

An additional complexity is presented by the large number of parties, the vast majority of whom reside abroad. As of March 31, 1954, over 2400 separate individuals had intervened as parties. Over 700 of these have since been dismissed from the the litigation. Peti-

tioners have addressed separate sets of interrogatories to each of these intervenors and, in a large number of instances, have served supplemental interrogatories. The Special Master has presided over numerous hearings relating to objections to interrogatories alone. While it is true this Court did not consider the presence of 87 plaintiffs, without more, in *La Buy* a serious complexity, surely one reaches a point sooner or later where mere numbers do become complex. It is respectfully submitted any figure in excess of 2000 parties must be in this area.

It is clear from the language of Rule 53 that a reference to a Master is appropriate when exceptional conditions require it. We submit that the facts of this case clearly demonstrate the exceptional conditions contemplated by the rule. The Court of Appeals was entirely right when it said, "We think that if ever there is to be a case presenting itself as 'the exception and not the rule', it is this one." 273 F. 2d 268, 271.

The Status of the Special Master

Petitioners suggest, in broad general phraseology, that since this case is still in the discovery stage the Special Master has not done much of significance. We do not believe they seriously suggest he has not gained extensive familiarity with the case.

For example, the Special Master presided over the deposition of Dr. Hans Sturzenegger which required some 60 days to complete, covered some 6000 pages of testimony and involved some 700 documents. He conducted lengthy hearings during which a great deal of evidence was taken as to the good faith of respondent Interhandel in its efforts to comply with Chief Judge

Laws' order of July 5, 1949, to produce what were referred to as the "Sturzenegger Papers".[3]

In addition to the problems of the corporate litigation, the Special Master has, since the admission of the more than 2400 intervenors beginning in 1952, conducted in excess of 20 separate hearings relating to the complicated and involved problems of the respondent intervenors, Kaufman, Attenhofer, Klinger, et al. (J.A. 2-16). These hearings have covered some 1700 pages of transcript and in conjunction therewith the Special Master has written a number of lengthy and scholarly opinions and signed numerous orders (J.A. 87, 99, 102, 105, 12, 123, 125). He has dealt with both substantive and procedural questions. He has signed orders permitting parties to intervene; he has signed orders dismissing parties from the litigation; he has considered such varied questions as the propriety of interrogatories and the necessity for testimony in foreign lands by means of Letters Rogatory; he has fixed a "bar date" prohibiting further intervention; and he has ruled on the applicability of the Anti-Assignment statute (R.S. 3477) and thus determined whether substantial numbers of intervenors were to be dismissed from the litigation.

Petitioners' argument (Pet. p. 12) that there has been a significant change of circumstances since the order of reference was signed is, in reality, an afterthought which was not argued to the District Judge. The argument was had on February 6, 1959 (J.A. 136). Thereafter, on March 9, 1959, at a subsequent hearing during which the order was presented, petitioners' counsel for the first time took the position (J.A. 152-

[3] This was done under an order signed by Chief Judge Laws on March 1, 1951. (J.A. 86).

154) that Mr. Justice Harlan in *Societe Internationale* v. *Rogers*, 357 U.S. 197, 213, pronounced, in effect, new law when he stated "It may be that in the absence of complete disclosure by * * * [Interhandel] the District Court would be justified in drawing inferences unfavorable to * * * [Interhandel] as to particular events."

It is respectfully submitted that the quoted language pronounced neither new law nor unknown doctrines relating to inferences which may be drawn when there is a lack of evidence or proof. On the contrary, this language is both familiar and agreeable to lawyers.

CONCLUSION

The District Judge carefully weighed the considerations relating to the motion seeking revocation of the order of reference. He found no reason, either in law or in fact, sufficiently persuasive to convince him to modify the order of reference. Petitioners have presented nothing to this Court which even remotely sustains the charge of abuse.

The petitioner for a writ of certiorari should be denied.

Respectfully submitted,

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